Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1998

BILLY MEL ALFORD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

J. STEPHEN COOPER
Attorney for Petitioner
3524 Fairmount Street
Dallas, Texas 75219
(214) 522-0670

149067

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

48 pp

QUESTIONS PRESENTED

1. As a matter of due process, must a sentencing court "err on the side of caution" in calculating the quantity of drugs involved in an offense where the evidence of such weight is stated as being a "guess" within a broad range?

2. Is a Local Rule implementing the Speedy Trial Act binding on the Government?

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Appendix C — Amended Judgment Of The United States District Court For The Western District Of Texas, Pecos Division, Filed July 28, 1998 ..... 17a

Petitioner, Billy Mel Alford, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *United States v. Alford*, 142 F.3d 825 (5th Cir. 1998) (App. A). The Court of Appeals denied Petitioner's motion for rehearing without a written opinion (App. B). There was no written opinion of the district court but its judgment is found at App. C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit ("Court of Appeals") was entered on May 28, 1998. The Court of Appeals denied a timely petition for rehearing on July 14, 1998 (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

18 U.S.C. § 3161(c)(1) of the Speedy Trial Act provides:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of

> an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

The Local Rules For The United States District Court For The Western District Of Texas, Appendix K, Sec. II, D.(4) provides:

> 4. *Superceding Charges.* If, after an indictment or information has been filed, a complaint, indictment, or information is filed which charges the defendant with the same offense or with an offense required to be joined with that offense, the time limit applicable to the subsequent charge will be determined as follows:
>
> * * *
>
> (b) If the original indictment or information is pending at the time the subsequent charge is filed, the trial shall commence within the time limit for commencement of trial on the original indictment or information. [§ 3161(h)(6)]
>
> * * *

STATEMENT OF THE CASE

Petitioner was convicted of four counts of importation of marijuana in violation of 21 U.S.C. §§ 952(a) and 960(a)(1) and four counts of possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Petitioner

appealed his conviction and sentence to the Court of Appeals pursuant to the jurisdiction conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

The Court of Appeals vacated and remanded two counts for dismissal after finding Petitioner's statutory speedy trial rights were violated. App. A, p. 9. The remaining six counts and Petitioner's sentences thereon were affirmed. App. A, p. 16.

The facts material to the two questions presented will be set forth separately.

A. Quantity of Marijuana

The Government produced evidence which, in the light most favorable to the verdict, demonstrated that Petitioner, along with several others, imported quantities of marijuana from Mexico into Texas near the Big Bend National Park for the purpose of transporting the same to the Dallas/Fort Worth area for distribution.

The presentence report detailed the weights of marijuana involved in this case as follows:

2/96 trip	68 kilograms
4/96 trip	226 kilograms
5/96 trip	226 kilograms
Cd. Chihuahua trip	317 kilograms
10/96 trip	1173 kilograms
11/96 trip	1173 kilograms
TOTAL	3108 kilograms

PSR.13

Other than the "11/96 trip", these weights were based solely on the testimony of a co-conspirator, Paul Preston. Petitioner objected to the assignations of the weights on the "trips" other than the "5/96 trip" and the "11/96 trip." Objections to PSR, letter from counsel dated July 10, 1997. In general, the bases for Petitioner's objections were that Preston had no knowledge of the weight in the "2/96 trip" and that the other objectionable weights were acknowledged by Preston to be just guesses and the weight could have been significantly lower.

In rejecting Petitioner's objections, the district court simply found Preston to be credible. TR.3-43. The trouble with this finding of credibility of Preston is found in the following testimony:

> Q. [Defense Counsel] So you were upping the ante?
>
> A. No. I don't know how, I never could tell the weight, because they are in packages. We never could tell the weight.
>
> Q. So you were guessing at the weight?
>
> A. Yeah.
>
> Q. So when you guessed 500 pounds, for instance, it could be 400; right?
>
> A. Yes, sir.
>
> Q. When you guess 400, it could be 200?
>
> A. Yes, sir.
>
> Q. And when you say 700, it could be 300?

A. Well, no, I don't think so in that Suburban. It was pretty loaded.

Q. So when you say 700, it would be 350 or what?

A. It could be about 500.

TR.1-191.

* * *

Q. Okay, So your estimates of the non-present marijuana or non-seized marijuana would be merely a guess then?

A. Yes, sir.

TR.1-215-6.

The significance of the district court's finding of 3108 kilograms being involved in the offense is that the Base Offense Level of 34 would be reduced to 32 if the weight were less than 3000 kilograms. U.S.S.G. § 2D1.1(c)(4). Thus, if the total weight were merely 109 kilograms (240 pounds) less than the high "guesses" accepted by the district court, Petitioner's ultimately determined Base Offense Level of 38 would have been 36. Even with the sentencing court's decision to increase Petitioner's Criminal History Category from III to VI, Petitioner's guideline range would have been 324-405 months, U.S.S.G., Ch. 5, Part A., or lower than the 480 months to which he was sentenced. App. C.

B. Speedy Trial

Petitioner was indicted originally on January 9, 1997. R.6. He made his first appearance before a judicial officer of the district trial court on February 3, 1997. R.16-17. In accordance with 18 U.S.C. § 3161(c)(1), Petitioner was required to be tried within 70 days of February 3, 1997 (or by April 14, 1997).

The docket sheet reflects trial was originally set for March 3, 1997. RE.7. The superseding indictment was filed February 27, 1997. R.25. The docket sheet does not reflect any entry relevant to the March 3rd trial setting, but the docket sheet does show the case was next set for trial on March 28, 1997. RE.7. However, on that date, the case was reset for trial to April 28, 1997. RE.7.

There appears nothing in the record as to why the case was reset from either of the first two trial settings. Nor did the district court make any findings as to any periods of excludable delay.

Petitioner's trial was on the superseding indictment and the original indictment remained pending until after sentencing when it was dismissed by the Government. RE.10.

The speedy trial implementation plan for the Western District of Texas provides that

> [i]f the original indictment or information is pending at the time the subsequent charge is filed, the trial shall commence within the time limit for commencement of trial on the original indictment or information.

Local Rules for the United States District Court For The Western District Of Texas, Appendix K, Sec. II, D.(4)(b).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH OTHER CIRCUITS IN THE EVALUATION OF UNCERTAIN AND INCONSISTENT EVIDENCE AS TO THE QUANTITY OF DRUGS INVOLVED IN AN OFFENSE.

The Court of Appeals characterized the testimony of Paul Preston as to the weights involved as being "estimates" and thus an acceptable basis for the district court's fact-finding of 3108 kilograms. Petitioner first would observe that "to estimate" is not a synonym for "to guess."[1]

Further, other courts of appeals have imposed far more exacting standards in evaluating what the Court of Appeals described as the "somewhat imprecise" testimony of Preston. App. A, p. 15.

In *United States v. Phillippi*, 911 F.2d 149 (8th Cir. 1990), *cert. denied*, 498 U.S. 1036 (1991), a witness described making two cocaine deliveries to the defendant of two packages which were similar in size and appearance to the two one-kilogram packages seized at the defendant's arrest. The trial court accepted these "estimates" of the quantity of the earlier

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1. estimate . . . 1. to form an approximate judgment or opinion regarding the value, amount, size, weight, etc., of: calculate approximately . . . - Syn.1. compute, count, reckon, gauge.

   guess . . . 1. to form an opinion of at random or from evidence admittedly uncertain - Ant . . . know.

THE AMERICAN COLLEGE DICTIONARY (1953).

deliveries but the court of appeals held such testimony "did not clearly establish . . . the amounts of cocaine delivered." 911 F.2d at 151.

There appears an agreement among at least six circuits that

> [i]f the exact amount [of drugs] cannot be determined, an estimate will suffice, but here also a preponderance of the evidence must support the estimate. Thus when choosing between a number of plausible estimates of drug quantity, none of which is more likely than not the correct quantity, a court must err on the side of caution.
>
> * * *
>
> Adopting this standard allows a District Court to perform its traditional fact-finding mission, yet still protects defendants from being held responsible for drug quantities in excess of the amounts for which they more likely than not are responsible. Allowing a court to find a defendant responsible for the maximum quantity of drugs than can plausibly be found could result in defendants receiving excessive sentences based on a finding of quantity that is more likely than not excessive. Such a result would violate a defendant's due process rights. See *Townsend v. Burke*, 334 U.S. 736, 741, 68 S.Ct. 1252, 1255, 92 L.Ed. 1690 (1948) (sentences may not be based on "materially false" information); *McDowell*, 888 F.2d 290-91; *Wilson*, 900 F.2d at 1353. While this may result in an underestimation of the quantity of drugs involved in some few cases, we believe it is nonetheless constitutionally required to prevent excessive sentences.

United States v. Walton, 908 F.2d 1289, 1302 (6th Cir.), *cert. denied*, 498 U.S. 990 (1990).

The First, Seventh, Eighth, Ninth, and Tenth Circuits have each cited this analysis from *Walton*, *supra*, with approval: *United States v. Skylar*, 920 F.2d 107, 113 (1st Cir. 1990); *United States v. Shorter*, 54 F.3d 1248, 1261 (7th Cir.), *cert. denied*, 516 U.S. 896 (1995); *United States v. Lawrence*, 915 F.2d 402, 409 (8th Cir. 1990); *United States v. August*, 86 F.3d 151, 154 (9th Cir. 1996); and *United States v. Richards*, 27 F.3d 465, 469 (10th Cir. 1994).

"To err on the side of caution" approach was not used by the Court of Appeals in its conclusion that Preston's self-described "guesses" were actually "estimates," especially when it is noted that, in *every* instance, the district court accepted the higher (or highest) of Preston's two (or more) "estimated" weights of any particular load.

As its sole citation of authority that estimates may be used to calculate the weight of the marijuana, the Court of Appeals cited *United States v. Sherrod*, 964 F.2d 1501, 1508 (5th Cir. 1992). However, there was a failure to observe that *Sherrod* itself required "sufficient indicia of reliability." 964 F.2d at 1508. The Court of Appeals also failed to address *United States v. Durate*, 950 F.2d 1255, 1266 (7th Cir. 1991), *cert. denied*, 506 U.S. 859 (1992) as cited by Petitioner for the proposition that the district court should have made findings which reflected why it accepted Preston's higher (or highest) range as to each load of marijuana. In rejecting Petitioner's objections to the weight calculation suggested by the probation officer, the court merely stated it found Preston credible. TR.3-43.

However, given the fact that Preston had testified to both a high and low end of a range of weight, Petitioner contends

> [w]hen the court clearly relies upon one of two contradictory statements offered by a single witness, it should directly address the contradiction and

> explain why it credits one statement rather than the other.

United States v. Durate, *supra*, at 1266.

The Court of Appeals observed that Preston's testimony as to there being a range of possible weights rather than exact figures came out in cross-examination.[2] Due process requires that, given the range testified to, "when choosing between a number of plausible estimates of drug quantity, none of which is more likely than not the correct quantity, a court must err on the side of caution." *United States v. Walton*, *supra*, at 1302.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW OPERATES TO ABROGATE, SUB SILENTIO, A SPECIFIC LOCAL RULE IMPLEMENTING THE SPEEDY TRIAL ACT.

Petitioner's trial did not commence within the seventy days prescribed under the Speedy Trial Act. 18 U.S.C. § 3161(c)(1). There were no excludable periods under 18 U.S.C. § 3161(h). A superceding indictment was filed during the seventy day period and the original indictment remained pending until after sentencing when it was dismissed by the Government. Petitioner, prior to trial commencing, moved for a dismissal of the superceding indictment pursuant to 18 U.S.C. § 3161 and the speedy trial plan for the Western District.

The speedy trial implementation plan for the Western District of Texas provides:

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2. Cross examination is "'the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970), quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940).

> 4. *Superceding Charges.* If, after an indictment or information has been filed, a complaint, indictment, or information is filed which charges the defendant with the same offense or with an offense required to be joined with that offense, the time limit applicable to the subsequent charge will be determined as follows:
>
> * * *
>
> (b) If the original indictment or information is pending at the time the subsequent charge is filed, the trial shall commence within the time limit for commencement of trial on the original indictment or information. [§3161(h)(6)]
>
> * * *

Local Rules For The United States District Court For The Western District Of Texas, Appendix K, Sec. II, D.(4).[3]

The Court of Appeals accurately stated that Petitioner's motion to dismiss was based on both the Speedy Trial Act, 18 U.S.C. §§ 3161-74, as well as the Local Rules. App. A, p. 2. However, in its opinion the Court of Appeals wholly failed to address any impact of the provisions of the Local Rules on Petitioner's motion to dismiss.

The Speedy Trial Act, 18 U.S.C. §§ 3161-74, contains extensive provisions dictating the implementation of the Act. These provisions include the mandate that each district develop a plan for compliance with the Act and imposes the on-going duty of each district to monitor the effectiveness of its plan and rectify deficiencies if there are any. *See generally*, 18 U.S.C. §§ 3165-74.

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3. Another Texas district court has an identical provision in its speedy trial plan. Local Rules For The United States District Court For The Eastern District Of Texas, Appendix F, 4(d)(2).

The Western District of Texas, pursuant to the Act, adopted a specific plan as required under the Speedy Trial Act. Appendix K, Local Rules for the United States District Court For The Western District Of Texas. *Cf. Henderson v. United States*, 476 U.S. 321, 328 n.9 (1986) ("It would be useful in the future for circuit and district court rules to include specific timetables, thereby giving substance to the obligations of prosecutors and defense counsel under the Speedy Trial Act").

Included in this plan is the provision that where a superceding indictment includes a charge from the original indictment and the original indictment is still pending at the time of the new indictment, the time limits continue to be calculated from the commencement of the original proceeding. Appendix K, Sec. II, D.(4). Such circumstances are exactly those present in Petitioner's case.

The Court of Appeals noted that, under the Act itself, the Government could have waited until after the trial of the original indictment and then brought a new indictment containing the new charges so as to avoid any speedy trial problems. App. A, p. 8. While this appears to be true, this observation fails to account for the Local Rule and further fails to address the possible reasons for the Western District to enact rules to discourage such a practice.

It seems fair to say the Speedy Trial Act placed pressure on the district courts to enact rules and procedures to avoid the backlog of criminal cases then existing throughout the nation. Placing emphasis on judicial economy seems a wise choice on the part of any district and enacting rules which discourage the Government from engaging in piece-meal litigation would appear to aid such goal. (This of course begs the question of why the Government would choose to bring a second indictment after the completion of a successful prosecution in the first case

for related criminal conduct resulting in a significant prison sentence.)

The district court may well have also wanted its rules to discourage "game-playing" by the Government by its bringing a superceding indictment just to back door a continuance. Or, maybe the Western District didn't want its scarce trial slots wasted by a belated superceding indictment which would likely force the defense to seek a continuance to prepare for the new charges.

Whatever the reasons were behind Sec. II, D.(4), barring some fatal conflict with another overriding right of the parties, the rule should have been held binding on the Government.

The Court of Appeals cited *United States v. Kelly*, 45 F.3d 45, 48 (2d Cir. 1995) and *United States v. Lattany*, 982 F.2d 866, 872 n.7 (3d Cir. 1992), *cert. denied*, 510 U.S. 829 (1993) as to circuits which also had adopted the analysis used in the case at bar. A review of these cases reveals a ready distinction: neither case involves a local rule which mandates the commencement of trial within the time limits applicable to the original indictment.

Local rules generally have the force and effect of law and are binding on the parties and the court which promulgated them. *In re Adams*, 734 F.2d 1094, 1098-9 (5th Cir. 1984).

If local rules are not, or may not be, binding on the parties and the court, then for the benefit of the bench and the bar, some guidance should be given as to why this local rule can be ignored and when other local rules similarly can be disregarded.

CONCLUSION

This case presents an opportunity to advance the true uniformity in sentencing the United States Sentencing Guidelines were designed to promote. But the desired objective that similarly situated persons shall be sentenced similarly cannot be obtained if there are dissimilar criteria used to establish the facts that the guidelines require.

Additionally, granting this petition can further the necessary understanding of the role local rules play in the regulation of the conduct of the parties who appear in the district courts.

For the reasons stated, Petitioner respectfully requests this Court grant his petition for writ of certiorari.

Respectfully submitted,

J. STEPHEN COOPER
Attorney for Petitioner
3524 Fairmount Street
Dallas, Texas 75219
(214) 522-0670

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 28, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50642

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BILLY MEL ALFORD,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

Before WISDOM, KING, and DAVIS, Circuit Judges.

KING, Circuit Judge:

Defendant-appellant Billy Mel Alford appeals his conviction and sentence for four counts of importation of marijuana in violation of 21 U.S.C. §§ 952(a) and 960(a)(1) and four counts of possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). For the reasons set forth below, we affirm in part, vacate in part, and remand.

Appendix A

I. FACTUAL BACKGROUND

On January 9, 1997, Billy Mel Alford was charged in a two-count indictment with importation of marijuana and possession of marijuana with intent to distribute on or about November 27, 1996. Alford was arraigned on this indictment on February 4, 1997. On February 27, 1997, Alford was charged in a ten-count superseding indictment. Counts 1 and 2 of the superseding indictment charged Alford with importation of marijuana and possession of marijuana with intent to distribute in or about February 1996; counts 3 and 4 charged him with importation of marijuana and possession of marijuana with intent to distribute on or about April 22, 1996; counts 5 and 6 charged him with importation of marijuana and possession of marijuana with intent to distribute between on or about May 26, 1996 and June 2, 1996; counts; 7 and 8 charged him with importation of marijuana and possession of marijuana with intent to distribute on or about October 29, 1996; and counts 9 and 10 charged him with importation of marijuana and possession of marijuana with intent to distribute on or about November 26, 1996. The government concedes that the offenses charged in counts 9 and 10 were based upon the same conduct that formed the basis of counts 1 and 2 of the original indictment. Alford's trial commenced on April 28, 1997. On the same date, Alford filed a motion to dismiss the superseding indictment on the ground that trying him on the indictment would violate the Speedy Trial Act, 18 U.S.C. §§ 3161-74, and the Speedy Trial Plan for the Western District of Texas. The district court denied the motion. The jury convicted Alford on counts 3 through 10 of the indictment and acquitted him on counts 1 and 2. Alford concedes that sufficient evidence exists to support the convictions.

Appendix A

Alford's presentence investigation report (PSR) determined Alford's offense level to be 40 and his criminal history category to be III, which subjected him to a Sentencing Guidelines range of 360 months to life imprisonment. *See* UNITED STATES SENTENCING GUIDELINES MANUAL ch. 5, pt. A (Sentencing Tbl.) (1995). The PSR calculated Alford's base offense level as 34, based upon a determination that 3108 kilograms of marijuana were attributable to Alford in relation to the offenses of conviction. *See id.* § 2D1.1. The PSR recommended a two-level upward adjustment for possession of a dangerous weapon, *see id.* § 2D1.1(b)(1), and a four-level upward adjustment based on Alford's role as an organizer or leader of criminal activity involving five or more participants or that: was otherwise extensive, *see id.* § 3B1.1(a). The PSR also noted that the district court might consider an upward departure pursuant to § 4A1.3 of the Guidelines if it found that Alford's criminal history category of III did not adequately reflect the seriousness of Alford's criminal past or his propensity for committing future crimes.

Alford objected to the PSR's calculation of his base offense level on the ground that insufficient evidence supported the amount of marijuana that the PSR attributed to him. He also objected to the PSR's recommendation of an increase in his offense level for possession of a dangerous weapon. The district court sustained Alford's objection to the increase for possession of a dangerous weapon but overruled his objection regarding the amount of marijuana attributable to him. The court then concluded that an upward departure was warranted on the following grounds:

> [I]n studying this presentence report, it occurs to me that the criminal history category in this matter

doesn't really show up the seriousness of this particular crime. It's a criminal history category of III, and my problem with that is it doesn't adequately show the convictions that Mr. Billy Mel Alford had for sale and delivery of marijuana in the 204th District Court of Dallas County in 1977, in the cause numbers that are set forth, 7701, 526, 527 and 528. When you put these marijuana convictions which were excluded because they were pretty far back, really they went back of his previous conviction that Mr. Alford suffered in my Court. So based on his previous history of convictions in ' 77, based on his convictions here in the District Court of the Western District, Pecos Division, all for marijuana, I find that Mr. Alford was at least 18 years old, that the instant offense is a felony that deals with a controlled substance. I further find that Mr. Alford has at least two prior felony convictions of either a crime of violence or a controlled substance. And in this instance, it would be a controlled substance. I find that the criminal history category of III doesn't adequately represent Mr. Alford's career offenses, and so I am going to sentence him under, given the two-point reduction for the gun, under an offense level of 38 and a criminal history category of VI, because I believe, having Mr. Alford before, watched him operate, seen his modus operandi, that he is indeed a career offender.

Alford did not object to the district court's decision to increase his criminal history category. The Guidelines imprisonment range for an offense level of 38 and a criminal history category of VI is 360 months to life. *See id.* ch. 5, pt. A (Sentencing

Tbl.) The district court imposed concurrent sentences of 480 months' imprisonment on each count of conviction to be followed by a five-year period of supervised release. The district court also imposed a $200,000 fine ($25,000 per count of conviction) and an $800 special assessment ($100 per count of conviction). Alford filed a timely notice of appeal.

II. DISCUSSION

On appeal, Alford challenges his judgment of conviction and sentence on the following three grounds:

1. the district court erred in denying his motion to dismiss the superseding indictment based upon his statutory right to a speedy trial;

2. the district court abused its discretion in increasing his criminal history category to VI; and

3. the district court erred in concluding that more than 3000 kilograms of marijuana were attributable to him.

We address each of these issues in turn.

A. The Speedy Trial Act

The Speedy Trial Act generally requires that the trial of a criminal defendant "commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. § 3161(c)(1); *see also United States v. Bermea,* 30 F.3d 1539, 1566 (5th Cir. 1994). However, the

Act tolls the seventy-day clock for certain statutorily enumerated periods of delay. *See* 18 U.S.C. § 3161(h); *Bermea*, 30 F.3d at 1566.

Alford contends that the district court's denial of his motion to dismiss the superseding indictment violated his statutory right to a speedy trial because his trial commenced approximately eighty-four days after his arraignment on the initial indictment.[1] He contends, and the government concedes, that none of this time was excludable under the tolling provisions contained in § 3161(h). Alford therefore argues that the district court was required to dismiss the superseding indictment. *See* 18 U.S.C. § 3162(a)(2) ("If a defendant is not brought to trial within the time limit, required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant.").

By conceding that more than seventy non-excludable days transpired between Alford's arraignment and the commencement of his trial, the government essentially concedes that a Speedy Trial Act violation occurred with respect to counts 9 and 10 of the superseding indictment. In *United States v. Gonzales*, 897 F.2d 1312, 1316 (5th Cir. 1990), we held that

> [t]he filing of a superseding indictment does not affect the speedy-trial clock for offenses charged in the original indictment or any offense required under double jeopardy principles to be joined with the original offenses. The seventy-day speedy-trial period continues to run from the date of the original

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1. Both parties agree that Alford's arraignment constituted his first appearance before a judicial officer of the court where the indictment was pending.

> indictment or arraignment, whichever was later, and all speedy-trial exclusions apply as if no superseding indictment had been returned. This rule prevents the government from circumventing the speedy-trial guarantee by restarting the speedy-trial clock by obtaining superseding indictments with minor corrections.

Id. at 1316 (citations omitted). Thus, because Alford's trial did not commence within seventy days after Alford's first appearance before a judicial officer of the court where the original indictment was pending, counts 9 and 10 of the superseding indictment, which were offenses charged in the original indictment, were subject to dismissal.

However, counts 1 through 8 of the superseding indictment were not charged in the original indictment, and Alford has not attempted to — nor can he — establish that double jeopardy concerns required the government to try the offenses alleged in counts 1 through 8 along with counts 9 and 10. *See United States v. Register*, 931 F.2d 308, 312-13 (5th Cir. 1991) (holding that a defendant charged with two counts of possession of cocaine with intent to distribute occurring on separate dates could not establish that prosecution on both counts constituted double jeopardy without proving that the cocaine forming the basis of each count came from the same "stash"); *United States v. Marable*, 578 F.2d 151, 153 (5th Cir. 1978) ("To support a claim of double jeopardy, a defendant must show that the two offenses charged are in law and fact the same offense."). This case therefore forces us to confront a question that we expressly left open in *Gonzales*: "whether a new speedy-trial clock begins for new offenses charged in the superseding indictment [that the double jeopardy clause would not require the government

to Join with the original charges], when the indictment retains some of the original charges." *Gonzales,* 897 F.2d at 1316. We answer this question in the affirmative and join two other circuits that have done the same. *See United States v. Kelly,* 45 F.3d 45, 48 (2d Cir. 1995); *United States v. Lattany,* 982 F.2d 866, 872 n.7 (3d Cir. 1992).

It is clear that, as to charges that the government is not required to join with the offenses charged in the original indictment, the government may obtain a fresh speedy trial clock by simply waiting until completion of the prosecution for the charges contained in the original indictment and beginning a new prosecution on the additional charges. We see no logical basis for concluding that, when the government chooses to add in a superseding indictment charges that it is not required to join with the charges contained in the original indictment, it must bring the defendant to trial on the added charges within the time period remaining on the speedy trial clock applicable to the charges contained in the original indictment. Under the construction of the Speedy Trial Act that we adopt, the defendant is guaranteed that his trial on a particular charge is brought within seventy non-excludable days of the later of his indictment on the charge or his first appearance before an officer of the court where the charge is pending. Where, as here, the defendant is not brought to trial on the superseding indictment within seventy non-excludable days of the later of the defendant's first appearance or the filing of the original indictment, the counts in the superseding indictment that were contained in the original indictment (or those that the double jeopardy clause requires to be joined with them) are subject to dismissal.

Well under seventy days transpired between the filing of the superseding indictment and Alford's trial. We therefore

conclude that, as to counts 1 through 8 of the superseding indictment, no Speedy Trial Act violation occurred. However, Alford's trial on counts 9 and 10 violated the Act. Accordingly, we vacate the district court's judgment of conviction and sentence on counts 9 and 10 and remand for dismissal of these counts of the indictment.

A dismissal for violation of the Speedy Trial Act may be with or without prejudice, *see* 18 U.S.C. § 1362(a)(2), and the Act prefers neither remedy over the other, *see United States v. Johnson*, 29 F.3d 940, 945 (5th Cir. 1994). While we may in some circumstances make the determination of the appropriate type of dismissal ourselves, *see id.*, as a general rule, "the trial court is best situated to decide whether to dismiss indictments with or without prejudice in light of a Speedy Trial Act violation." *United States v. Blackwell*, 12 F.3d 44, 48 (5th Cir. 1994) (emphasis omitted); *see also United States v. Willis*, 958 F.2d 60, 64 (5th Cir. 1992) ("The district court is best situated to decide whether to dismiss with prejudice. We reverse the convictions for violation of the Speedy Trial Act but leave to the district court the nature of that dismissal."); *United States v. Melquizo*, 824 F.2d 370, 371 (5th Cir. 1987) ("[T]he decision whether to dismiss a complaint under the Speedy Trial Act with or without prejudice is entrusted to the sound discretion of the district judge . . . ." (internal quotation marks omitted)). We therefore remand to the district court so that it may determine whether the dismissal of counts 9 and 10 of the superseding indictment should be with or without prejudice. The Speedy Trial Act provides that, in making this determination,

> the court shall consider, among others, each of the following factors: the seriousness Of the offense; the facts and circumstances of the case which led to

> the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

18 U.S.C. § 3162(a)(2).

B. Increase in Criminal History Category

Alford next argues that the district court erred in increasing his criminal history category from III to VI. He contends that the court's reasons for the departure do not comply with the requirements for upward departures in this Circuit. Specifically, he argues that the district court did not explain why intermediate criminal history categories were not appropriate as required by *United States v. Lambert*, 984 F.2d 658 (5th Cir. 1993) (en banc), and that his sentence should therefore be vacated and the case remanded for resentencing. We generally review a district court's decision to depart from the Guidelines for an abuse of discretion. *See United States v. McKenzie*, 991 F.2d 203, 204 (5th Cir. 1993). However, Alford did not object to the upward departure in the district court. "Under Federal Rule of Criminal Procedure 52(b), this court may correct forfeited errors only when the appellant shows that (a) there is an, error, (2) the error is plain, and (3) the error affects her substantial rights." *United States v. Ravitch*, 128 F.3d 865, 869 (5th Cir. 1997) (citing *United States v. Olano*, 507 U.S. 725, 732-35 (1993)). Even if the appellant satisfies these factors, "the decision to correct the forfeited error falls within this court's sound discretion," and we will not exercise that discretion to correct a forfeited error "unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* Applying the plain error standard, we have held that, in circumstances in which the trial court could reinstate the same

sentence were the case remanded, the defendant's sentence is sustainable even though "the district court's stated reasons for departing evidence a mistaken application of the Sentencing Guidelines." *Id.; see also United States v. Brunson,* 915 F.2d 942, 944 (5th Cir. 1990). Put another way, under the plain error standard of review, "we will uphold a defendant's sentence if on remand the district court could reinstate the same sentence by relying on a reasonable application of the Sentencing Guidelines." *Ravitch,* 128 at 871.

The district court may depart from the otherwise applicable Guidelines range if reliable information indicates that the defendant's criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.3. When departing on the basis of § 4A1.3, "the district court should consider each intermediate criminal history category before arriving at the Sentence it settles upon; indeed, the court should state for the record that it has considered each intermediate adjustment." *Lambert,* 984 F.2d at 662. *Id.* However, this court does not

> require the district court to go through a ritualistic exercise in which it mechanically discusses each criminal history category it rejects en route to the category that it; selects. Ordinarily the district court's reasons for rejecting intermediate categories will clearly be implicit, if not explicit, in the court's explanation for its departure from the category calculated under the guidelines and its explanation for the category it has chosen as appropriate.

Id. at 663.

Alford's criminal history points placed him in criminal history category III. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, Pt. A (Sentencing Tbl.). Three of Alford's criminal history points resulted from a prior conviction of ten counts of possession of marijuana with intent to distribute and one count of conspiracy to possess marijuana with intent to distribute. Additionally, he had six criminal convictions, three of which were drug convictions, that were not considered in the criminal history computation because of their age. *See id.* § 4A1.2(e). The district court could reasonably conclude that a criminal history category of III did not adequately reflect the seriousness of Alford's criminal history or his propensity for recidivism. *See id.* § 4A1.2 Application Note 8 ("If the court finds that a sentence imposed outside th[e] time period [imposed by § 4A1.2(e)] is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under § 4A1.3 . . . ."). Further, it was not unreasonable for the district court to conclude that an increase of more than one in Alford's criminal history category was warranted. Assuming merely for the sake of argument that the district court's statement of the reasons for its departure was inadequate under. *Lambert* (i.e., assuming that the reasons that the district court chose a criminal history category of VI as opposed to an intermediate category were not implicit in its stated reasons for the departure), were we to remand the case, the district court could properly impose the same sentence by stating on the record that it had considered the intermediate criminal history category of IV and determined that a category of V was appropriate.[2] We therefore conclude

2. The district court could impose the same sentence were it to raise Alford's criminal history category only to V because the same Guidelines range — 360 months to life — applies to an offense level of 38 with a criminal history category of V or VI. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A.

that the district court's upward departure did not constitute plain error warranting a vacation of Alford's sentence and resentencing on counts 3 through 8.

C. Amount of Marijuana Attributed to Alford

Alford finally contends that the district court erred in concluding that more than 3000 kilograms of marijuana were attributable to him for sentencing purposes. The district court's calculation of the quantity of drugs involved in an offense is a factual determination. *See United States v. Ponce,* 917 F.2d 841, 842 (5th Cir. 1990); *United States v. Rivera,* 898 F.2d 442, 445 (5th Cir. 1990). "Factual findings regarding sentencing factors are entitled to considerable deference and will be reversed only if they are clearly erroneous." *United States v. Watson,* 966 F.2d 161, 162 (5th Cir. 1992). "A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole." *United States v. Sanders,* 942 F.2d 894, 897 (5th Cir. 1991).

"[A] presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the sentencing guidelines." *Id.* at 898. A district court may adopt facts contained in the PSR without further inquiry if the facts have an adequate evidentiary basis and the defendant does not present rebuttal evidence. *See United States v. Puig-Infante,* 19 F.3d 929, 943 (5th Cir. 1994). "The defendant bears the burden of showing that the information in the PSR relied on by the district court is materially untrue." *United States v. Valencia,* 44 P.3d 269, 274 (5th Cir. 1995); *see also United States v. Ruiz,* 43 F.3d 985, 989 (5th Cir. 1995); *Puig-Infante,* 19 F.3d at 943.

In this case, the district court accepted the PSR's conclusion that 3108 kilograms of marijuana were attributable to Alford in relation to the charged offenses. Alford challenges the reliability of the PSR's calculation, arguing that it was based in part on the testimony of Paul Preston, Alford's coconspirator, who stated or cross-examination that the unseized quantities of marijuana that he testified were involved in some of the charged offenses were guesses and that the actual quantities could have been smaller. Alford argues that, because Preston characterized the amounts to which he testified as guesses and acknowledged that the actual quantities could have been smaller, the district court should have erred on the side of assuming smaller quantities for sentencing purposes.

We conclude that the district court did not clearly err in calculating the amount of marijuana attributable to Alford. The fact that Preston's testimony was somewhat imprecise did not preclude reliance on it for sentencing purposes because a district court may consider "estimates of the quantity of drugs for sentencing purposes. *United States v. Sherrod,* 964 F.2d 1501, 1508 (5th Cir. 1992). Preston's testimony that the amounts involved could have been smaller than the amounts that he stated on direct examination is merely an acknowledgment that the amounts to which he testified were estimates rather than exact figures. Moreover, Alford presented no rebuttal evidence establishing that the information in the PSR regarding the amount of marijuana attributable to him was materially untrue. As such, the district courts determination that 3108 kilograms of marijuana were attributable to Alford was not implausible on this record and therefore not clearly erroneous.

III. CONCLUSION

For the foregoing reasons, we VACATE the district court's judgment of conviction and sentence on counts 9 and 10 of the superseding indictment and REMAND for dismissal of those two counts and a determination of whether the dismissal should be with or without prejudice. We affirm the district court's judgment of conviction and sentence in all other respects.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION OR REHEARING FILED JULY 14, 1998

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-50642

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BILLY MEL ALFORD

Defendant - Appellant

Appeal from the United States District Court for the

Western District of Texas, Pecos

ON PETITION FOR REHEARING

Before WISDOM, KING, and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

s/ Carolyn Dinein King
United States Circuit Judge

APPENDIX C — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, PECOS DIVISION, FILED JULY 28, 1998

UNITED STATES DISTRICT COURT
Western District of Texas
PECOS DIVISION

UNITED STATES OF AMERICA

v.

BILLY MEL ALFORD

Defendant.

AMENDED
JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, BILLY MEL ALFORD, was represented by J. Stephen Cooper.

On motion of the United States the court has dismissed count(s) 1 and 2 of the original indictment. The defendant has been found not guilty on count(s) 1 and 2 of the superseding indictment and is discharged as to such count(s).

The defendant was found guilty on count(s) 3,4,5,6,7,8,9,10 of the superseding indictment by a jury verdict on April 30, 1997 after a plea of not guilty. On July 22, 1998, the Fifth Circuit Court of Appeals issued a Mandate dismissing Counts 9 and 10 of the superseding indictment. Accordingly, the defendant is adjudged guilty of the following offense(s):

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Title & Section	*Nature of Offense*	*Date of Offense*	*Count Number(s)*
21 USC 952(a) 960(a)(1)	Importation of a Quantity of Marijuana	April 22, 1996 thru November 26, 1996	3,5,7
21 USC 841(a)(1)	Possession with Intent to Distribute a Quantity of Marijuana	April 22, 1996 thru November26, 1997	4,6,8

As pronounced on July 27, 1998, the defendant is re-sentenced per Mandate dated July 22, 1998, as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $600.00 ($100 for each count, for count(s) 3,4,6,7, and 8 of the superseding indictment, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court, 410 South Cedar Street, Pecos, Texas, 79772.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgement are fully paid.

Appendix C

Signed this the 27th day of JULY, 1998, NUNC PRO TUNC the 22nd day of July, 1997.

Defendants SSN: 460-96-6745
Defendant's Date of Birth: May 5, 1953
Defendant's address: 903 North Castner, Terrell, Texas

s/ Lucius D. Bunton
LUCIUS D. BUNTON
Senior United States District Judge

Appendix C

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 480 months on each of **COUNTS 3,4,5,6,7, and 8** to run **CONCURRENTLY** with each other. **TOTAL TERM OF IMPRISONMENT — 480 MONTHS.**

The Court makes the following recommendations to the Bureau of Prisons: The Federal Correctional Institution, Seagoville, Texas, is recommended as the place of incarceration.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgement.

_____
United States Marshal

By _____
Deputy Marshal

Appendix C

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years on each of **COUNTS 3,4,5,6,7, and 8** to run **CONCURRENTLY** with each other. **TOTAL TERM OF SUPERVISED RELEASE — FIVE (5) YEARS.**

While on supervised release, the defendant shall comply with the following additional conditions:

X The defendant shall abide by the standard conditions of probation/supervised release recommended by the Sentencing Commission and amended by the United States District Judges for the Western District of Texas dated May 6, 1991.

X If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the District to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

X The defendant shall not be permitted to reside anyplace where firearms are possessed or stored and shall not own or possess a firearm or destructive device.

X The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment, and at least two periodic drug tests thereafter, as directed by the United States Probation Officer.

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X If the defendant does not participate in a prerelease program administered by the Bureau of Prisons in the district to which the defendant is released for supervision, the defendant shall reside for a period of 180 days to commence immediately upon release from imprisonment in a halfway house designated by the United States Bureau of Prisons and/or the United States Probation Office and shall observe the rules of that facility. Further, once employed, the defendant shall pay 25% of his weekly gross income for his subsistence as long as that amount does not exceed the daily contract rate.

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STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance. Revocation of probation and supervised release is mandatory for possession of a controlled substance.

3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device. Probation must be revoked for possession of a firearm.

4) The defendant shall not leave the judicial district without the permission of the court or probation officer.

5) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

7) The defendant shall support his or her dependents and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

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9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

13) The defendant shall permit a probation officer to visit him or her at any time or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

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16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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FINE

The defendant shall pay a fine of $150,000; payable to the CLERK, U.S. DISTRICT COURT, 410 South Cedar Street, Pecos, Texas, 79772.

This amount is the total of the fines imposed on individual counts, as follows:
$25,000 for each of COUNTS 3,4,5,6,7, and 8.

If the fine exceeds $2,500.00, interest will accrue on this fine unless the fine is paid in full within 15 days of this judgment pursuant to 18 U.S.C. § 3612(f)(1).

This fine shall be paid **IMMEDIATELY.**

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Appendix C

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report, except the court allows adjustment for possession of a firearm, and adopts a guideline calculation based on USSC § 4A1.3 and § 4B1.1 as a career offender.

Guideline Range Determined by the Court:

Total Offense Level:	38
Criminal History Category:	VI (pursuant to USSC § 481.1)
Imprisonment Range:	360 months to 480 months (on counts 3 thru 6) 360 months to LIFE (on counts 7 and 8)
Supervised Release Range:	4 to 5 years (on Counts 3 thru 6) 5 years (on Counts 7 and 8)
Fine Range:	$ 25,000 to $ 2,000,000 (on Counts 3 thru 6) $ 25,000 to $ 4,000,000 (on Counts 7 and 8)
Restitution:	$ N/A

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): The sentence given is necessary to adequately address the seriousness of the offense and the defendant's prior criminal record.